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No. 80-1663

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and T. W. GLEASON, Individually and as he is President of International Longshoremen's Association, AFL-CIO, and H. R. HASSELGREN, Individually and as he is Secretary-Treasurer of International Longshoremen's Association, AFL-CIO and N. J. BOWERS, Individually and as he is Executive Vice President of International Longshoremen's Association, AFL-CIO and F. R. FIELD, JR., Individually and as he is General Organizer of International Longshoremen's Association, AFL-CIO and A. SCOTTO, Individually and as he is Regional Director of International Longshoremen's Association, AFL-CIO and J. T. MOOCK, Individually and as he is First Vice President of International Longshoremen's Association, AFL-CIO and R. A. MASSEY, Individually and as he is Second Vice President of International Longshoremen's Association, AFL-CIO and G. W. DIXON, Individually and as he is Third Vice President of International Longshoremen's Association, AFL-CIO and W. P. LYNCH, Individually and as he is Fourth Vice President of International Longshoremen's Association, AFL-CIO,

Petitioners,

v.

ALLIED INTERNATIONAL, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Table of Authorities

Cases:

American Radio Association v. *Mobile Steamship Association*, 419 U.S. 215 (1974) ..... *passim*

Windward Shipping v. *American Radio Association*, 415 U.S. 104 (1974) ..... *passim*

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REPLY BRIEF FOR PETITIONERS

The submissions by the Solicitor General, by the respondent, and by amici, the American Farm Bureau Federation (AFBF) and Occidental Chemical Company ("Occidental"), fail entirely in their attempts to demonstrate federal labor law jurisdiction, the threshold question presented in the case. Each offers its own theory why the holding in *Windward Shipping* v. *American Radio Association,* 415 U.S. 104 (1974) and *American Radio Association* v. *Mobile Steamship Association,* 419 U.S. 215 (1974) should not be followed here. None presents a tenable rationale when measured against this Court's controlling decisions.[1]

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[1] The secondary boycott and First Amendment issues in this case differ from the jurisdictional issue in that they have no clear-cut precedent like *Windward/Mobile* against which the parties' analyses can be tested. The contentions of respondent and its supporting amici on these issues are rebutted in petitioners' main brief. The arguments need not be repeated.

In the light of respondent's concession that the court of appeals did not direct the entry of summary judgment against petitioners, the summary judgment question is no longer at issue.

The crux of the Solicitor General's argument on the jurisdictional issue, which mirrors the position of the National Labor Relations Board, is that "[t]he union activity in *Windward* and *Mobile* consisted of *primary* picketing directed at the employment conditions of foreign seamen on foreign ships, conduct outside the Board's jurisdiction. Although the same picketing affected domestic employers, this effect was merely an incident of the ship picketing which was beyond the Board's reach." Brief for the United States as Amicus Curiae, at 15-16 (emphasis added). In this case, the Solicitor General contends, "the union engaged exclusively in purely *secondary* activity against employers subject to the Board's jurisdiction. Since this is the only activity involved, there is no need, as there was in *Windward/Mobile,* to separate the domestic secondary effects from activity over which the Board lacked jurisdiction." *Id.* at 16 (emphasis added).

The Solicitor General misinterprets both the unions' action and this Court's analysis in *Windward* and *Mobile.* Those cases involved a single act—picketing to protest the substandard wages paid to foreign seamen on foreign flag ships. In determining whether that activity was outside the reach of the Labor Management Relations Act (LMRA), this Court did *not* inquire whether the union protest, or any aspect of it, could be characterized as "primary" activity against foreign shipowners or "secondary" activity against domestic employers, as those terms are used in applying the secondary boycott provisions of the LMRA. Rather, as demonstrated in petitioners' main brief (see also Brief for the AFL-CIO as Amicus Curiae), the focus of this Court's inquiry in *Windward* and *Mobile* was on whether the underlying dispute was a domestic labor dispute or a foreign dispute implicating the "delicate field of international relations." *Windward,* 415 U.S., at 110. Spe-

cifically, *Windward* and *Mobile* held that, when the union's concern is with the practices of foreign nationals and when the union's action has potential international implications going beyond "the sort of wage-cost decision benefitting American workingmen which the LMRA was designed to regulate," *id.* at 115, then the union's action is *not* "in commerce" as defined in the LMRA and is not regulated by the Act.

Under this Court's analysis it is immaterial whether the union action at issue could be characterized as "primary" or "secondary." In *Mobile,* the union's action exerted economic pressure on domestic employers. Indeed, that pressure was "a crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected." *Mobile,* 419 U.S. at 224. The union's action was held beyond the reach of the Act not by virtue of a supposed distinction based on the primary/secondary dichotomy, but because the "*same* pressure upon foreign flag owners [would] result if longshoremen refuse[d] to load or unload their ships" as would result if American shippers ceased patronizing their ships. *Id.* at 225 (emphasis added). Thus, there is no support in this Court's decisions for the conclusion that only activity that can be classified as "primary" can have those implications for foreign trade and international relations that counseled against extension of the Act's coverage in *Windward* and *Mobile.*

This becomes all the more plain when it is remembered that the claims of *preemption* in *Windward* and *Mobile* posed questions as to whether the challenged union action could be characterized as protected "primary" activity (*Windward*) or prohibited "secondary" activity (*Mobile*) for purposes of applying the substantive provisions of the LMRA. In each case, this Court disposed of the

controversy short of any inquiry into these issues, stating in *Windward* that "[s]ince we hold that respondents' picketing was not 'in commerce' as defined by the Act, we do not reach the question of whether the activity was otherwise of such a nature that state courts would be precluded by the LMRA from entertaining an action to enjoin it." 415 U.S. at 115. These cases turned on the threshold question of whether the challenged union action—in light of the nature of the underlying dispute and the attendant implications of the union activity for international trade and foreign relations—is beyond the regulatory reach of the federal labor laws.

The contentions of respondent and its supporting amici curiae on the jurisdictional issue are readily dismissed. Respondent's two-step acid test for jurisdiction would inquire into whether the union's conduct is arguably protected by Section 7 of the Act and if so, whether foreigners will find the result offensive. Respondent's Brief at 25. Merely to recite this test is to establish that it is alien to the analysis of *Windward* and *Mobile*. In those cases, this Court did not even consider whether the union action in issue would have been protected or prohibited had the LMRA applied at all.

AFBFs' position is that union activity is exempt from the coverage of the NLRA when it is in furtherance of an underlying *labor* dispute with a foreign shipowner but not when it relates to a foreign controversy of another kind. As shown in petitioners' main brief, at 12, union activity is *more* clearly outside the coverage of the federal labor laws when it concerns international military conflict than when it concerns international problems. (See also brief for the AFL-CIO as Amicus Curiae, at 8-10).

Occidentals' argument that *Windward* and *Mobile* should be restricted to identical situations involving labor rela-

tions aboard foreign ships (Occidental Brief, at 10-17) has already been addressed. Petitioners' main brief at 15, or 13 and 14. Occidental's claim that comity requires only the avoidance of conflict with foreign labor and maritime law (Occidental brief at 19) is but a variant on respondent's two-step test,—a thinly disguised policy argument designed to predetermine the outcome so that the union loses and, in this case, so that the Soviet Union prevails.

Windward and *Mobile* then, properly viewed, preclude application of the LMRA to the union's action here. This case, like *Windward* and *Mobile,* involves a single act by a union. The impetus for that action, and the focus of the union's concern, was Soviet aggression abroad—a matter totally outside domestic labor relations. The union's response—a suspension in the handling of all Russian ships and all cargo bound for or arriving from Russia—was directed towards the Soviet Union, with significant implications for its foreign policy. The union's concern could not be accommodated by the "sort of wage-cost decision benefitting American workingmen which the LMRA was designed to regulate." Under *Windward* and *Mobile,* the effect of the union's action on Soviet trade agencies and the Soviet government, as well as the effect on domestic shippers, stevedores, and importers are therefore beyond the reach of the LMRA. As this Court held in *Mobile,* it will not permit "a bifurcated view of the effects" of a single labor action. 419 U.S. at 222.

For the foregoing reasons and for the reasons set forth in petitioners' main brief, the judgment of the court of appeals should be reversed.

Dated: New York, New York
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Respectfully submitted,

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